CASE NO. 05-6596

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

ROGER CLAYTON WHITE,

Defendant-Appellant.

On Appeal from the
United States District Court
for the Eastern District of Kentucky

APPELLANT'S SUPPLEMENTAL BRIEF

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In sentencing Appellant to 264 months in prison, the judge expressly relied on crimes of which the jury had acquitted him to increase his sentence by 167 months. The use of acquitted crimes to calculate Mr. White's guideline range violated his constitutional rights to jury trial and to proof beyond a reasonable doubt. This Court may avoid these constitutional issues, as Congress has never authorized the use of acquitted conduct to calculate the guideline range, and not even the Sentencing Commission has authorized it in the manner used here. The Court can also reject the use of acquitted conduct in calculating the guideline range as an unsound judgment that was not based on past practice or national experience, that creates unwarranted disparity and disrespect for law, and that the Commission has failed to justify or explain.

I. The Use Of Acquitted Crimes To Calculate Mr. White's Guideline Range Violated His Right To Jury Trial.

The Framers guaranteed an absolute right to trial by jury in both the original Constitution and the Bill of Rights. *See* U.S. Const. Art. III, § 2, cl. 3, U.S. Const. Amend. 6. As the Supreme Court unanimously explained in *United States v. Gaudin*, 515 U.S. 506 (1995), the "right was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors . . . as the great bulwark of their civil and political liberties.'" *Id.* at 510-11, quoting 2 J. Story, Commentaries on the Constitution of

the United States 540-41 (4th ed. 1873). To effectuate the jury's purpose, "'the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.'" *id.* at 510, quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) ("Blackstone"), the jury "'must unanimously concur in the guilt of the accused before a legal conviction can be had,'" *id.* at 510, quoting 2 J. Story, Commentaries on the Constitution of the United States 541, n. 2 (4th ed. 1873), and its "constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514. *Accord United States v. Booker*, 543 U.S. 220, 230, 237, 238-39, 244 (2005); *Blakely v. Washington*, 542 U.S. 296, 301-02, 306-07, 313 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000).

The Framers intended the jury to "stand between the individual and the power of the government." *Booker*, 543 U.S. at 237. They "knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). They "understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases." *Booker*, 543 U.S. at 238-39, quoting The Federalist No. 83, p. 499 (C.

Rossiter ed.1961) (A. Hamilton). They "carried this concern from England, in which the right to a jury trial had been enshrined since the Magna Carta." *Id.* at 239.

Colonial juries played a crucial role in resisting English authority before the Revolution, acquitting and mitigating the fixed punishments then in effect in politically motivated trials. "This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." *Jones v. United States*, 526 U.S. 227, 245 (1999), citing 4 Blackstone 238-39. Measures to bar the right to jury trial and to limit opportunities for jury nullification were attempted, resisted, and eventually unsuccessful, leaving juries in control of both the factfinding role and the ultimate verdict by applying law to fact. *Id.* at 247-48.

In this context, the Framers intended the right to jury trial as both an individual right of persons accused of crime, and a structural allocation of political power to the citizenry. To function as intended, the jury was to "confirm the truth of every accusation" and "draw the ultimate conclusion of guilt or innocence," *Gaudin,* 515 U.S. at 510, 514, and punishment was to be derived from the jury verdict alone. *Blakely*, 542 U.S. at 306; *see also Apprendi*, 530 U.S. at 479-80 & n.5. Only then could the jury "exercise the control that the Framers intended" and

"the people's ultimate control . . . in the judiciary" be assured. *Blakely*, 542 U.S. at 306. "The jury could not function as the circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 306-07 (emphasis in original).

A. The Use Of Acquitted Crimes To Calculate The Guideline Range Deprived Mr. White Of His Right To Have A Jury Confirm Or Reject Every Accusation.

All nine justices in *Booker* agreed that, at least as to elements of crimes of which the defendant is accused, the jury must confirm the truth of every accusation. 543 U.S. at 239; *id.* at 327-28 (Rehnquist, C.J., dissenting). Indeed, the Framers could not have intended to guard against governmental oppression through criminal juries with ultimate power to confirm or reject the truth of every accusation, to acquit even in the face of guilt, and to partially acquit to lessen unduly harsh punishment, only to allow an administrative agency, prosecutor and judge to then nullify the jury's acquittal. Doing so eviscerates the "fundamental reservation of power" in the jury and prevents it from "exercis[ing] the control that the Framers intended." *Blakely*, 542 U.S. at 306. And doing so by ignoring the "[e]qually well founded ...companion right to ... proof beyond a reasonable doubt" is no answer. *Apprendi*, 530 U.S. at 478. Like other "'inroads upon the sacred

bulwark of the nation," the use of acquitted crimes to calculate the guideline range is "fundamentally opposite to the spirit of our constitution.'" *Booker*, 543 U.S. at 244, quoting 4 Blackstone 343-44.

B. The Use Of Acquitted Crimes To Calculate The Guideline Range Deprived Mr. White Of His Right To a Sentence Wholly Authorized By The Jury's Verdict.

The Sixth Amendment guarantees a sentence that is wholly authorized by the jury's verdict. *See Cunningham v. California*, 127 S. Ct. 856, 869 (2007) ("If the jury's verdict alone does not authorize the sentence . . . the Sixth Amendment requirement is not satisfied."); *Blakely*, 542 U.S. at 306 (*Apprendi* "ensures that the judge's authority to sentence derives wholly from the jury's verdict"); *Apprendi*, 530 U.S. at 483 n.10 ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury."). The following history demonstrates that the use of acquitted crimes to calculate Mr. White's guideline range violated that guarantee. When a court uses acquitted crimes to calculate a determinate guideline sentence, the court "is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved," and "they are facts comprising different crimes, each in a different count." *United States v. Pimental*, 357 F. Supp. 2d 143, 152-53 (D. Mass. 2005).

Determinate Jury Factfinding. When the right to jury trial was established in

this country, the punishment for a felony was specified by the law defining the offense and the judge simply pronounced judgment without finding facts or exercising discretion; the sentence was thus dictated by the jury's verdict. *Apprendi*, 530 U.S. at 478-81 & n.5 (citing authorities); *Jones*, 526 U.S. at 244 (citing authorities).

Indeterminate Judicial Sentencing. In the 19th century, there was a shift from statutes with fixed-term sentences to statutes allowing complete judicial sentencing discretion within a statutory range. *Apprendi*, 530 U.S. at 481. The aim of such "indeterminate" sentencing was "[r]eformation and rehabilitation."[1] *Williams v. New York*, 337 U.S. 241, 248-49 (1949). The judge was not required to find or give any weight to facts in imposing sentence, and could impose sentence "giving no reason at all." *Id.* at 252. In *Williams*, the defendant did not attempt to challenge the accuracy of the allegations or ask the judge to disregard them. *Id.* at 244. In this context, the Supreme Court held that a judge could rely on "out-of-court" sources without offending due process. *Id.* at 248, 252.

Determinate Judicial Factfinding Before *Apprendi*, *Blakely* and *Booker*. The U.S. Sentencing Guidelines created a hybrid system in which facts with both a determinate and mandatory effect were found by a judge, and (according to the

[1] The judge's function was "similar to that of a social work or doctor exercising clinical judgment." Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U. L. Rev. 419, 425 (1999).

Commission, but not Congress, *see* III(C), *infra*) by a preponderance of the evidence. This scheme and others like it in the states operated undisturbed for many years. The Supreme Court then held, based on extensive examination of the historical underpinnings of the rights to jury trial and to proof beyond a reasonable doubt, that a judge may not find facts by a preponderance of the evidence that expose a defendant to punishment that is not wholly authorized by the jury's verdict. *See Apprendi*, 530 U.S. at 482-83 & n.10, 490, 494, 496; *Blakely*, 542 U.S. at 303-04, 305; *Booker*, 543 U.S. at 244.

Before this line of cases, however, the Supreme Court held that the use of acquitted conduct to calculate the guideline range did not violate the Double Jeopardy Clause. *United States v. Watts*, 519 U.S. 148 (1997) (*per curiam*). In opposition to Mr. White's petition for rehearing *en* banc, the government relied heavily on *Watts*, and to a lesser extent on *Witte v. United States*, 515 U.S. 389 (1995). However, in response to the government's argument that these cases precluded the application of *Blakely* to the Guidelines, the majority in *Booker* emphasized that both cases were decided under the Double Jeopardy Clause, that in neither case "was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment," that "*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and

did not even have the benefit of full briefing or oral argument," and that "[i]t is unsurprising that we failed to consider fully the issues presented to us in these cases." *Booker*, 543 U.S. at 240 & n.4. Indeed, *Watts* could not stand under the Supreme Court's subsequent Fifth and Sixth Amendment jurisprudence.[2] Thus, the government's reliance on *Watts* is unavailing, and because it was decided under the Double Jeopardy Clause, this Court would not, as the government contends (Gov. En Banc Resp. 8), be "overruling" Supreme Court precedent in holding that the use of acquitted conduct violates the Fifth and/or Sixth Amendments.

Further, the very premise of *Watts* has now been rejected by the Court. In 1970, Congress codified *Williams v. New York* in 18 U.S.C. § 3577 ("[n]o limitation shall be placed on the information . . . which a court of the United States may receive and consider"), then recodified it to 18 U.S.C. § 3661 in the Sentencing Reform Act. The *Watts per curiam* opinion was premised on the

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[2] Contrary to the government's contention (Gov. En Banc Resp. 4), Justice Breyer's mention of *Watts* in the course of his description of the Guidelines *before* they were held to violate the Sixth Amendment does not support its position. Indeed, his policy rationale for "real offense" sentencing in "tried cases" was that judges should not be deprived "of the ability to use post-verdict-acquired real-conduct information," or "conduct the prosecutor chose [not] to charge," *Booker*, 543 U.S. at 256, which does not apply to offenses that were charged, tried, and rejected by the jury. Further, he and three other justices agreed with the other five that a jury must confirm the truth of elements of charged crimes. *Id.* at 327-28 (Rehnquist, C.J., dissenting). In *Watts* itself, even without briefing or argument and three years before *Apprendi*, Justice Breyer recognized that the Guidelines' treatment of acquitted conduct collides with the right to a jury determination of guilt or innocence. *See Watts*, 519 U.S. at 159 (Commission should revisit the issue "[g]iven the role that juries and acquittals play in our system.") (Breyer, J., concurring); *see also id.* at 170 (use of acquitted conduct "raise[s] concerns about undercutting the verdict of acquittal") (Kennedy, J., dissenting).

notion that Section 3661 and *Williams* precluded a prohibition on the use of acquitted conduct in sentencing, even to increase the guideline range, because, it thought, "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." 519 U.S. at 151-52. Justice Stevens maintained that Congress did not authorize, nor did the Constitution allow, the use of acquitted conduct under Section 3661's "no limitation" rubric *except* to choose a sentence within the guideline range, the only area where the court had unfettered discretion. *Id.* at 160-62 (Stevens, J., dissenting). Justice Breyer did not believe that Section 3661 required the use of acquitted conduct in calculating the guideline range, suggesting that the Commission abolish it. *Id.* at 159 (Breyer, J., concurring).

When the Court later addressed whether determinate sentencing violated the Sixth Amendment, Justice Stevens turned out to have been correct. *Williams*, the Court said, provided no support for judicial factfinding in a determinate guideline system because it "involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record," and the judge could "giv[e] no reason at all" for the sentence imposed. *Blakely*, 542 U.S. at 305 (internal citations and quotation marks omitted). "Indeterminate sentencing does not . . . infringe[] on the province of the jury" because any facts a judge "may implicitly rule on" in such a system "do not pertain to whether the defendant has a *right* to a lesser [guideline] sentence." *Id.* at 308-09 (emphasis in original). A

"right" to a lesser sentence, the Court explained, meant that "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305 n.8 (emphasis in original). The same applies to any guideline system in which judges are *required* to use acquitted conduct in calculating the guideline range, as they are today.

Determinate Judicial Factfinding After *Booker*, *Rita* and *Gall*. The remedial opinion in *Booker* made the guidelines to some extent "advisory," 543 U.S. 245-46 (as modified, the SRA "*requires* a sentencing court to consider Guidelines ranges, but it *permits* the court to tailor the sentence in light of [the] other statutory concerns as well") (emphasis supplied), but factfinding under the guidelines remains determinate. The "district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," and "to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 2007 WL 4292116, at *7 (Dec. 10, 2007). When the judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," must give "a more significant justification [for] a major departure . . . than a minor one," and "must adequately explain the chosen sentence." *Id.* at *7.

In other words, to "calculate" the guideline range "correctly," the judge *must* re-examine crimes rejected by the jury under a preponderance standard, and once the judge finds that the defendant committed an acquitted crime under that standard, he *must* assign the number of points the Guidelines require. The judge's fact finding is determinate; he has no discretion not to "calculate" the guideline range "correctly," *i.e.*, as the Guidelines require. The judge *must* then use this "calculation" as the "starting point and the initial benchmark," and *must* justify any "deviation" from it with a sufficiently compelling reason. This limited authority to "deviate" from the determinate guideline range makes the guidelines "advisory." The judge's fact finding necessarily affects sentence length because the guideline range is the only § 3553(a) factor with a number affixed and it is the "benchmark" from which both sentencing and appellate review proceed. *Gall*, at *6 (appeals courts review "the degree of variance" and "the extent of a deviation from the Guidelines").[3] By contrast, the "indeterminate-sentencing regime upheld in *Williams* . . . allowed a judge (but did not compel him) to rely on [extra-record] facts," or "no reason at all." *Blakely*, 542 U.S. at 305.

[3] A study of appellate decisions after *Booker* shows that 98.6% of within-guideline sentences appealed by defendants were affirmed, and 78.3% of below-guideline sentences appealed by the government were reversed. *See* Court of Appeals Review 12/1/05-11/30/06 at 2, available at www.fd.org/CourtofAppealsReview12.1.05-11.30.06.pdf. In the first quarter of 2007, only 11.9% of all sentences were non-government-sponsored below-guideline sentences, 1.5% were above-guideline sentences, and 86.7% were within-guideline or government-sponsored below-guideline sentences. U.S. Sentencing Commission, Preliminary Quarterly Data Report, http://www.ussc.gov/sc_cases/Quarter_Report_4th_07.pdf.

When a judge uses acquitted conduct to calculate the guideline range, he necessarily finds facts beyond the elements of the offense of conviction, and "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305 n.8 (emphasis in original). *See also Cunningham*, 127 S. Ct. at 863-64 ("under the Sixth Amendment, any fact that *exposes* a defendant to a greater *potential* sentence must be found by a jury, not a judge.") (emphasis added).

While an appellate court may presume a within-Guidelines sentence to be reasonable, *Rita v. United States*, 127 S. Ct. 2456, 2462-63 (2007), a sentence may not be reasonable absent consideration of facts not found by the jury, and if so, it violates the Sixth Amendment. *See Rita*, 127 S. Ct. at 2479-80 (Scalia, J., concurring); *id.* at 2473 (Stevens, J., concurring). "The door . . . remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Id.*, at *13 (Scalia, J. concurring). Unless this Court can say that it would uphold Mr. White's 264-month sentence as reasonable absent the district court's reliance on acquitted crimes for 167 months of that sentence, the sentence violated the Sixth Amendment.

II. The Use Of Acquitted Crimes To Calculate Mr. White's Guideline Range Violated His Right To Proof Beyond A Reasonable Doubt.

The requirement of proof beyond a reasonable doubt under the Fifth Amendment Due Process Clause protects against factual error whenever a potential loss of liberty is at stake, regardless of the identity of the factfinder or whether the finding results in "conviction" of a "crime." *In re Winship*, 397 U.S. 358, 363-64, 368 (1970). The Supreme Court has long held that facts to which the reasonable doubt standard applies are not just those that go to guilt or innocence, but those that increase punishment. *Mullaney v. Wilbur*, 421 U.S. 684, 697-99 (1975).

The Supreme Court has recently reaffirmed these principles: "Since *Winship*, we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.' This was a primary lesson of *Mullaney*."[4] 530 U.S. at 484. *See also Jones*, 526 U.S. at 240-43 & n.6; *Cunningham*, 127 S. Ct. at 863-64 (referring to independent right to proof beyond a reasonable doubt and tracing origins of recent Sixth Amendment jurisprudence to doctrinal discussions of *Winship* and *Mullaney* in *Jones*).

Though the Supreme Court has considered the Fifth Amendment right to proof beyond a reasonable doubt in tandem with the Sixth Amendment jury trial right, *Apprendi*, 530 U.S. at 478, it remains clear that the Fifth Amendment due

[4] The Court has distinguished *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) as involving a finding that resulted in a mandatory minimum sentence but did not expose the defendant to additional punishment within a range in which judicial discretion was otherwise entirely unfettered. *See Apprendi*, 530 U.S. at 486; *Jones*, 526 U.S. at 242.

process right remains distinct, *id.* at 476-77, and applies equally to judicial factfinding. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (despite the absence of jury factfinding, judge's use of the reasonable doubt standard assured that accuracy was not seriously diminished). Thus, *Booker*'s resolution of the Sixth Amendment issue, which concerned the reservation of control in the people against governmental power, did not address what standard of proof a *judge* must use under the Fifth Amendment to find facts that expose a defendant to additional loss of liberty. *Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.").

The judicial finding of acquitted crimes by a preponderance of the evidence in this case had a determinate, numerical impact on the guideline range; indeed, if the judge had not increased the guideline range by 10 levels based on that finding, he would have been reversed for incorrectly calculating the guideline range. *Gall*, supra, at *7. Further, absent that finding, the sentence would be reversed as unreasonably long. *Id.* at *13 (Scalia, J., concurring). The finding thus exposed Mr. White to additional loss of liberty, and was therefore required to be found beyond a reasonable doubt under *Winship*, *Mullaney*, and *Apprendi*.

The Guidelines require judges to revisit acquitted conduct at a lower standard of proof through the operation of certain commentary to USSG

§1B1.3(a)(2) and the Commission's 1991 addition to the commentary to a policy statement asserting that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements . . . in resolving disputes regarding application of the guidelines to the facts of a case." USSG §6A1.3, p.s., comment. (backg'd.). As a result, the use of acquitted conduct to calculate the guideline range "rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). As just demonstrated, however, the Commission's belief is mistaken. *Booker*, 543 U.S. at 319 n.6 (Thomas, J., dissenting). Moreover, the Commission is not a court, *Mistretta v. United States*, 488 U.S. 361, 384-85, 393-94, 408 (1989), and is thus prohibited by separation of powers from pronouncing minimum constitutional standards.

III. This Court Can Avoid These Serious Constitutional Issues By Interpreting The Relevant Statutes And Guidelines Not To Authorize the Use of Acquitted Conduct In Calculating The Guideline Range.

This Court can avoid the serious constitutional issues described above by applying "the reasonable presumption that Congress did not intend [an] alternative which raises serious constitutional doubts." *Martinez v. Clark*, 534 U.S. 371, 381 (2005); *see also Jones*, 526 U.S. at 239-40.

A. The Plain Language of the Sentencing Reform Act Does Not

Authorize The Use Of Acquitted Crimes In Calculating The Guideline Range.

There is no mention in the Sentencing Reform Act of guideline ranges being calculated based on acquitted (or uncharged) separate crimes. Rather, the plain language demonstrates that, to the extent Congress contemplated "real offense" sentencing, it intended that guideline ranges for a given offense of conviction would differ based on the circumstances of that offense, not that guideline ranges would be increased based on acquitted (or uncharged) other offenses.

Congress directed the Commission to take into account "the circumstances under which the *offense was committed*" and the "nature and degree of the harm caused by the *offense*," and to "avoid[] unwarranted sentencing disparities among defendants . . . who have been *found guilty* of similar criminal conduct," 28 U.S.C. §§ 994(c)(2), (3), 991(b)(1)(B) (emphasis added). It directed that the courts "shall impose a sentence sufficient, but not greater than necessary" "to reflect the seriousness of the *offense*" and "to provide just punishment for the *offense*," and in doing so to consider the "nature and circumstances of the *offense*," and "the need to avoid unwarranted sentence disparities among defendants . . . who have been *found guilty* of similar conduct," 18 U.S.C. § 3553(a)(1), (2)(A), (6) (emphasis added).

A "straightforward reading" of the word "offense" means the "offense of

conviction," *Hughey v. United States,* 495 U.S. 411, 416 (1990), and this is particularly clear where Congress simultaneously directed the Commission and the courts to avoid disparity among defendants "found guilty" of similar conduct.[5]

Finally, Section 3661, mistakenly cited in *Watts* as support for the use of acquitted conduct in calculating the guideline range, says no such thing. As Justice Breyer pointed out, the Commission is free to abolish what is merely its own questionable policy. *Watts*, 519 U.S. at 158-59 (Breyer, J., concurring). Moreover, Section 3661 refers to "conduct of a person convicted of an offense." Under the "rule of the last antecedent," a limiting phrase ("convicted of an offense") should be read as modifying the phrase that it immediately follows ("conduct of a person"). *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 343 (2005). Thus, an acquitted offense would not be included within the scope of "conduct of a person."

B. The Legislative History Supports This Reading.

The Senate Judiciary Committee expected "that there will be numerous guideline ranges, each describing a somewhat different combination of . . . *offense* circumstances." S. Rep. No. 98-225, at 168 (1983) (emphasis added). The House

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[5] Congress did not say, as the government contends (Gov. En Banc Resp. 4), that disparity is to be avoided among "those who have *committed* similar crimes in similar ways." (emphasis added)

Judiciary Committee explicitly rejected sentencing based on offenses the government failed to prove at trial: "The legislation does not authorize, nor does the Committee approve of, the use of sentencing guidelines based on allegations not proved at trial. To permit 'real offense' sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties." H.R. Rep. No. 98-1017, at 98 (1984).

The government's response that the House version was defeated in favor of the Senate's, (Gov. En Banc Resp. 9 n.2), mischaracterizes the article upon which it relies. The victory to which the authors referred was, *inter alia*, mandatory guidelines over advisory guidelines, and had nothing to do with acquitted crimes. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 233, 236, 257-280 (1984). The Government points to nothing in the statutes or even the legislative history that authorizes the use of acquitted crimes in calculating the guideline range. Moreover, the provision requiring a sentence not greater than necessary to satisfy sentencing purposes originated in the House version, *id.* at 271-72, now controls sentencing, and is a further basis for reversal. *See* Part IV, *infra*.

C. Congress Has Never Reviewed, Much Less Approved, The Use Of Acquitted Conduct To Calculate The Guideline Range.

Congress "examine[d]" the initial set of "guidelines promulgated under section 994(a)(1)," but not policy statements promulgated under section 994(a)(2) or any commentary. *See* Pub. L. 98-473, Title II, § 253, reprinted at 18 U.S.C. § 3551. Thereafter, the Commission has submitted to Congress only "amendments to the guidelines," which Congress may modify or disapprove but otherwise automatically take effect. *See* 28 U.S.C. § 994(p); *Stinson v. United States*, 508 U.S. 36, 40-46 (1993). Policy statements, commentary to guidelines, and commentary to policy statements are not reviewed by Congress. *Ibid.*

The initial relevant conduct guideline, presumably examined by Congress, described it as "all conduct, circumstances, and injuries *relevant to the offense of conviction*," and made no reference to offenses the government failed to prove at trial. USSG §1B1.3 (Nov. 1, 1987) (emphasis added). On January 15, 1988, the following language was buried in the background commentary to USSG §1B1.3, unreviewed by Congress: "Relying on the entire range of conduct, regardless of the number of counts . . . on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses," *i.e.*, "offenses of a character for which §3D1.2(d) would require grouping of multiple counts." USSG §1B1.3, comment. (backg'd.); App. C, Amend. 3 (Jan. 15, 1988). On Nov. 1, 1990, the phrase, "this provision does not require the defendant, in fact, to have been convicted of multiple counts," was added, again in commentary not

reviewed by Congress. USSG §1B1.3, comment. (n.2); App. C, Amend. 309 (Nov. 1, 1990)

As Justice Breyer described it in 1997, "the Guidelines, as presently written, do not make an exception for related conduct that was the basis for a different charge of which a jury acquitted," and "[t]o that extent, the Guidelines' policy rests upon the logical possibility that a sentencing judge and a jury, applying different evidentiary standards, could reach different factual conclusions." *Watts*, 519 U.S. at 159 (Breyer, J., concurring). The Sentencing Reform Act does not state a burden of proof for finding guideline facts. The preponderance standard originated in commentary to a policy statement, added in 1991 and never reviewed by Congress. USSG §6A1.3, p.s., comment. (backg'd.) ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."); USSG App. C, Amend. 387 (Nov. 1, 1991).

Finally, in an amendment to a guideline which Congress *did* review, the Commission stated that "[i]n determining the sentence within the guideline range, or whether a departure is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." USSG §1B1.4; App. C Amend. 4 (Jan. 15, 1988). Thus, even assuming Congress recognized that such information

encompassed acquitted offenses, the guideline by its terms does not permit its use in calculating the guideline range.

D. The Applicable Guidelines And Commentary In This Case Did Not Authorize The Use of Acquitted Crimes In Calculating Mr. White's Guideline Range.

The commentary to the relevant conduct guideline authorizes the use of acquitted crimes in calculating the guideline range "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts." USSG §1B1.3(a)(2). It is only with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts that the commentary makes any reference to crimes of which the defendant was acquitted. *See* USSG §1B1.3, comment. (n.3) ("Application of this provision [§1B1.3(a)(2)] does not require the defendant, in fact, to have been convicted of multiple counts."); *id.*, comment. (backg'd.) ("Relying on the entire range of conduct, regardless of the number of counts . . . on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses," *i.e.*, offenses described in subsection (a)(2)). *See also Watts*, 519 U.S. at 158-59 (Breyer, J., concurring) (recognizing this limitation).

Mr. White's guideline range was based on his conviction for bank robbery, the guideline for which, USSG §2B3.1, is explicitly excluded from USSG §3D1.2(d). The district court nonetheless enhanced his guideline range by 7 levels

under USSG §2B3.1(b)(2)(A) and another 3 levels under USSG §3A1.2, based on the conduct (of others) underlying the Section 924(c) counts of which Mr. White was acquitted. (Resent. Tr. 16-17, 22-23; Apx. 107-08, __) Even if the word "offenses" in USSG §1B1.3(a)(2) could be read as referring to *either* the offense of conviction or other uncharged or acquitted offenses, the Section 924(c) counts also are excepted from multiple count grouping rules. *See* USSG §2K2.4(b), §3D1.2, comment. (n.1). Thus, USSG §1B1.3(a)(2) and its commentary requiring the use of acquitted offenses in calculating the guideline range for offenses of a character for which USSG §3D1.2(d) requires grouping did not apply. *See, e.g., United States v. Jones*, 313 F.3d 1019, 1023 n.3 (7th Cir. 2002); *United States v. Tory*, No, 95-50335, 1996 WL 477054, at *3 (9th Cir. Aug. 21, 1996); *United States v. Ashburn*, 38 F.3d 803, 806 (5th Cir. 1994).

IV. Mr. White's Sentence Is Unreasonable Because The Commentary That Purportedly Required The Use Of Acquitted Conduct To Calculate His Guideline Range Exemplifies Unsound Judgment.

This Court may find that the Guidelines' acquitted crimes commentary reflects an "unsound judgment," that it "fails properly to reflect § 3553(a) considerations," and that Mr. White's sentence therefore is unreasonable. *Rita,* 127 S. Ct. at 2465, 2468. The courts are no longer required to simply defer to the Commission's policies.[6] *Id.* at 2463, 2465.

[6] While this challenge ordinarily would be raised before the district court in the first instance, *Rita* was decided nearly six months after the final briefs were submitted in this appeal, and

First, like the crack guidelines, the commentary that requires the use of acquitted conduct was not based on "empirical data and national experience." *Kimbrough v. United* States, 128 S. Ct. 558, 574 (2007). Though the Commission said that judges and the Parole Commission took into account many details of offenders' actual conduct in the pre-Guidelines era, USSG, Ch. 1, Pt. A, ¶ 4(a), the Parole Commission generally refused to take acquitted conduct into account,[7] due to the "perceived unfairness" of this approach.[8] Further, state guideline systems have never allowed the use of acquitted conduct in guideline calculations. Phyllis J. Newton, Staff Director, U.S. Sentencing Commission, *Building Bridges Between*

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arguments disagreeing with Guidelines' policy were disapproved before *Rita*. *E.g., United States v. Borho*, 485 F.3d 904, 912-13 (6th Cir. 2007); *United States v. Funk*, 477 F.3d 421, 427-31 (6th Cir. 2007). This Court has the inherent authority to consider arguments raised for the first time in an *en banc* petition when they involve a question of exceptional importance that was not previously available for all practical purposes. *United States v. Ellison*, 462 F.3d 557, 560-61 (6th Cir. 2006); *United States v. Henry*, 429 F.3d 603, 618-19 (6th Cir. 2005). And because this Court gives no deference to a district court's analysis when determining whether a factor is categorically proscribed, as a matter of law, from consideration under the guidelines, *United States v. Camejo*, 333 F.3d 669, 676 (6th Cir. 2003), it is not precluded from deciding the purely legal question briefed here. *Koon v. United States*, 518 U.S. 81, 100 (U.S. 1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.").

[7] *See* 28 C.F.R. § 2.19(c) (1980) ("[T]he Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent *admission* or other *clear indication* of guilt).") (emphasis added). Thus, even the Parole Commission's limited use of acquitted conduct was based on a more reliable standard than the preponderance of the "probabl[y] accurate" hearsay standard recommended by the Commission. USSG §6A1.3(a), p.s. & comment. (backg'd.)

[8] *See* 56 Fed. Reg. 16,269 (adoption of the prohibition "in 1979 reflected a concept of procedural fairness in keeping with the Commission's then-current practice").

the Federal and State Sentencing Commissions, 8 Fed. Sent. Rep. 68, 1995 WL 843512 *3 (Sept./Oct. 1995).

Second, the Commission's untested theory for its "real offense" approach was that it would prevent prosecutors from controlling sentencing outcomes through charge bargaining. USSG, Ch. 1, Pt. A, ¶ 4(a). Such concerns are not implicated by offenses that are charged in an indictment and tried to a jury.[9] Indeed, the Commission has recognized that "real offense" sentencing has shifted sentencing power to prosecutors and that this has created hidden, unwarranted disparity.[10] With regard to acquitted crimes, prosecutors get a second bite at the apple with a lower standard of proof and inadmissible evidence, and increased power to coerce guilty pleas by threatening to charge and obtain a sentence on a weak count even if the defendant is acquitted. Further, the "untrustworthy" information upon which acquitted conduct may be based, such as cooperating witness testimony, creates disparity and inconsistency.[11] In recognition of its problems, the Commission has drafted proposals to abolish the use of acquitted conduct, s*ee* Newton, *supra*, at *3; 62 Fed. Reg. 152, 161 (1997); 58 Fed. Reg.

[9] American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463, 1486 (2001).

[10] U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 25-27, 50, 86, 92, (2004).

[11] *Id.* at 50.

67,522, 67,541 (1993); 57 Fed. Reg. 62,832 (1992), but has never acted, for reasons it has not explained.

Third, punishing a defendant for acquitted crimes undermines respect for law, contrary to 18 U.S.C. § 3553(a)(2)(A). It is directly contrary to what ordinary citizens take for granted, signifies that the jury's work and the trial itself are meaningless, erodes the moral authority of the law, and promotes contempt for the justice system. As many courts have recognized, "most people would be shocked to find out that even United States citizens can be (and routinely are) punished for crimes of which they were acquitted." *United States v. Ibanga*, 454 F. Supp. 2d 532, 539 (E.D. Va. 2006).[12] In sum, the Guidelines' treatment of acquitted conduct is an unsound policy, "given the role that juries and acquittals play in our system." *Watts*, 519 U.S. at 159 (Breyer, J., concurring).

For all of the foregoing reasons, Mr. White's sentence should be reversed.

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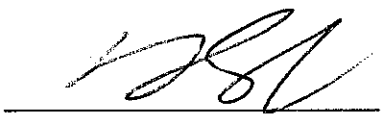
[12] *See also, e.g., United States v. Lombard*, 103 F.3d 1, 5 (1st Cir. 1996) ("many judges think that the guidelines are manifestly unwise . . . in requiring the use of acquitted conduct," and as a "matter of public perception and acceptance, the result can often invite disrespect for the sentencing process."); *United States v. Baylor*, 97 F.3d 542, 551 (D.C. Cir. 1996) (Wald, J., concurring specially) ("[T]his justification could not pass the test of fairness or even common sense from the vantage point of an ordinary citizen. The 'law,' however, has retreated from that standard into its own black hole of abstractions."); *United States v. Frias*, 39 F.3d 391, 392-94 (2d Cir. 1994) (Oakes, J., concurring) ("[T]his is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards.'"); *United States v. Coleman*, 370 F. Supp.2d 661, 668 (S.D. Ohio 2005) ("A layperson would undoubtedly be revolted by the idea that, for example, a person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.").

CONCLUSION

For the above stated reasons, the Appellant submits that the case be remanded for further proceedings.

Respectfully Submitted,



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I hereby certify that this brief was prepared in 14 point Times New Roman font using WordPerfect 10.0, and that the brief contains 6529 words.

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CERTIFICATE OF SERVICE

I hereby certify that two true copies of the foregoing was sent this 7 day of January, 2008, by regular U.S. mail with sufficient postage affixed to ensure delivery, to the office of:

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